IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VIRGINIA STEWART. <u>et al.</u> :

Plaintiff, : CIVIL ACTION

:

: NO. 98-4135

v. :

.

AVON PRODUCTS, INC.

:

Defendant. :

MEMORANDUM

BUCKWALTER, J. November 15, 1999

Presently before the Court is the Plaintiff's Motion for Class Certification. For the reasons stated below, the Motion is denied and the Class is not certified.

I. FACTUAL BACKGROUND

This putative class action arises from Avon's discontinuance of its Sponsorship Earnings Program ("SEP"). Avon is famous for its cosmetic and beauty products which are sold through a variety of measures, including the use of representatives who sell to customers at their homes and workplaces. The company encourages its representatives to recommend other persons to serve as Avon representatives and sell Avon branded products. From 1984 through June, 1998, Avon established the SEP as a means of rewarding representatives ("Sponsors") who recommended successful representatives to the company ("Sponsored Representatives").

Pursuant to the SEP, Avon agreed to pay Sponsors 5% of all purchases from Avon made by Sponsored Representatives ("Sponsorship Earnings"). In June of 1998, Avon announced it would be terminating the SEP in favor of emphasizing the Leadership Program (an alternative recruitment incentive program), which required Avon recruiters to be more involved with their recruits, while potentially offering better rewards to Sponsors. Avon offered its Sponsors the choice of 1) receiving a lump sum payment calculated at 150-200% of their 1997 Sponsorship Earnings in exchange for a release of claims against Avon for termination of SEP; or 2) continuing to receive 5% Sponsorship Earnings on sales of representatives already referred for an additional two years (until August 2000). There were approximately 10,000 eligible Sponsors when the "buy-out" was announced, 90% of whom elected to receive the lump sum payment in exchange for signing the general release. Plaintiff refused to sign the release or collect the lump sum payment. She has continued to collect her 5% Sponsorship earnings. Avon states that she will continue to receive earnings at this rate until August 2000. Plaintiff asserts, on behalf of herself and the proposed class, that Avon's actions constitute a breach of contract, as well as a breach of good faith and fair dealing. The Plaintiff also alleges that Avon has been unjustly enriched by discontinuing the SEP.

II. PROPOSED CLASS

The Plaintiff proposes the following class:

All Avon representatives who were Sponsors and participants in the Sponsorship Earnings Program as of July 1, 1998 and their successors in interest (the "Class"). Excluded from the Class is the defendant herein, and any person, firm, trust, corporation, or other entity related to or affiliated with the defendant, including, without limitation, persons who are directors of Avon.

The Class proposed by the Plaintiff includes both the representatives who signed the release in exchange for the lump sum (the 90% majority), and the minority who, like Plaintiff, did not sign the release.

III. LEGAL STANDARD

To obtain certification, Named Plaintiffs must satisfy the four prerequisites of Fed. R. Civ. P. 23(a), along with a showing that the action is maintainable under one of the subsections of Fed. R. Civ. P. 23(b). See Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2245 (1997); accord Barnes v. American Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998) (quoting Amchem). Plaintiff, as the proponent of the putative Class, has the burden of establishing a right to class certification. See Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974).

In determining the appropriateness of class certification, a court must examine carefully the factual and legal allegations. See Barnes, 161 F.3d at 140 (citing General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 160 (1982)). But, the court's findings are not on the merits because, for the purposes of class certification, the court must "refrain from conducting a preliminary inquiry into the merits." Id. (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974)). Thus, when doubt exists concerning certification of the class, the court should err in favor of allowing the case to proceed as a class action. See Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir.), cert. denied, 474 U.S. 946 (1985).

A. Fed. R. Civ. P. 23(a) Prerequisites

Under Rule 23(a), one or more members of a class may sue as representative parties on behalf of the entire class only if (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to

the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy of representation). "The requirements of Rule 23(a) are meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances." <u>Baby Neal ex rel. Kanter v. Casey</u>, 43 F.3d 48, 55 (3d Cir. 1994).

1. Rule 23(a)(1) -- Numerosity

To meet the numerosity requirement, "[t]he court must find that the class is 'so numerous that joinder of all members is impracticable." In re the Prudential Ins. Co. of Am., 148 F.3d 283, 309 (3d Cir. 1998) (quoting Fed. R. Civ. P. 23(a)(1)), cert. denied, 119 S. Ct. 890 (1999). Impracticability of joinder does not mean impossibility, but rather that the difficulty or inconvenience of joining all members of the putative class calls for class certification. See Pabon v. McIntosh, 546 F. Supp. 1328, 1333 (E.D. Pa. 1982) (Shapiro, J.). Impracticability itself depends on an examination of the specific facts of each case and imposes no absolute numerical limitations. See General Tel. Co. of Northwest, Inc. v. EEOC, 446 U.S. 318, 329 (1980); see also Gurmankin v. Costanzo, 626 F.2d 1132, 1135 (3d Cir. 1980) ("We believe that the numerosity requirement must be evaluated in the context of the particular setting . . ."); Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 109 (E.D. Pa. 1992) (Huyett, J.) (stating that the number in the class is not, by itself, determinative).

The putative Class meets the numerosity requirement of Rule 23(a)(1). According to Avon, there are approximately 10,000 Sponsors who were eligible for the lump sum payment. These potential Class members are dispersed throughout the nation, so joinder of claims would

be impracticable. Even if the proposed Class included only the Sponsors who refused the lump sum payment and release would meet the numerosity requirement as their number likely exceeds 1,000 members. The Defendant does not even contest this element of Rule 23(a).

2. Rule 23(a)(2)-- Commonality

The commonality inquiry asks whether "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This "requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class. Because the requirement may be satisfied by a single common issue, it is easily met. . . .

Furthermore, class members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice." Baby Neal, 43 F.3d at 56 (citations omitted). Accordingly, "the threshold of commonality is not high." In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir.) (quoting Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986)), cert. denied, 479 U.S. 852, 915 (1986). Assuredly, "[a] finding of commonality does not require that all class members share identical claims, and indeed 'factual differences among the claims of the putative class members do not defeat certification." In re Prudential, 148 F.3d at 310 (quoting Baby Neal, 43 F.3d at 56).

The Commonality requirement of Rule 23(a)(2) is met because there is at least one common question of law and fact. The outcome of this litigation depends on whether Avon has breached its contract with Sponsors by discontinuing the SEP. While there may be factual differences in how Avon offered SEP to individual Sponsors, the discontinuation of the program applied to all class members. The common questions include whether this decision could be

considered a breach of contract by Avon and whether the Company has been unjustly enriched by doing so. The Defendant does not contest the commonality requirement. Since the commonality threshold is low, this requirement is met by Plaintiff.

3. Rule 23(a)(3)-- Typicality

While similar, the typicality requirement is distinct from commonality.

"Typicality asks whether the named plaintiffs' claims are typical, in common-sense terms, of the class, thus suggesting that incentives of the plaintiffs are aligned with those of the class." Baby Neal, 43 F.3d at 55. "The typicality criterion is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to the claims of the named plaintiffs as to the claims of the absentees." Id. at 57. "[F]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members and if it is based on the same legal theory." Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 923 (3d Cir. 1992). Commonality and typicality overlap in that they hinge on whether the class members have similar claims. However, commonality tests the sufficiency of the class itself by focusing on the class claims, while typicality tests the sufficiency of the named plaintiff by focusing on the relation between the named plaintiff and the class as a whole. See Hassine v. Jeffes, 846 F.2d 169, 176 n.4 (3d Cir. 1988).

According to Defendant, 90% of the eligible Sponsors accepted the lump sum payment and signed the release. Therefore, they are in a very different position than the minority who, like Plaintiff, did not sign the release. However, factual differences will not defeat the typicality requirement if the claims of class members are based on the same legal theories.

Plaintiff's theory is that Avon violated a contractual obligation to continue SEP and was unjustly enriched when it unilaterally terminated the program, but continued to reap the benefits conferred by members of the Class. Viewed in this light, the Plaintiff's claims are typical of members of her proposed Class.

4. Rule 23(a)(4) -- Adequacy of Representation

This inquiry requires a finding that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequate representation encompasses two distinct inquiries designed to protect the interests of the absentee class members. First it requires that the plaintiff's attorney be qualified, experienced, and generally able to conduct the proposed litigation. Second, it serves to uncover conflicts of interests between named parties and the class they seek to represent. See, In re: Prudential, 148 F.3d at 312; Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir.), cert. denied, 421 U.S. 1011 (1975) (Plaintiff's interests must not be antagonistic to members of the proposed class). Since there is no debate over the qualifications of the proposed Class' counsel, the real issue here is whether Ms. Stewart has interests aligned with those of her fellow Class members.

The most glaring potential conflict here is between Plaintiff, who has not signed a release, and the overwhelming number of Class members who have. Courts have generally been reluctant to allow Class members who have executed releases of their claims in return for an award to be represented by individuals who have not executed releases. Melong v. Micronesian Claims Com'n, 643 F.2d 10, 13 (D.C. Cir. 1980) (311 non-signers of release could not adequately represent 7,500 signers of the release); Ciarlante v. Brown & Williamson Tobacco Corp., 1995 WL 764579 at *2 (E.D. Pa. Dec. 18, 1995) (refusing to allow non-signers of release

to represent members of proposed class who signed release). The Melong court explained that not only were the signers of a release barred from suit, but they could only join a class action by contesting the validity of their releases. Id., at 15. It continued, "when the purported class representative has not executed a release and need not establish that the release is defective, serious questions are raised concerning the typicality of the class representative's claims and the adequacy of his representation of the other class members". Id. A similar result was reached by the court in Greeley v. KLM Royal Dutch Airlines, 85 F.R.D. 697 (S.D.N.Y. 1980). (class certification denied because plaintiff who did not sign release had interests not coextensive with those of the class and his claim is not typical of those of the class).

The Plaintiff argues that it can be an adequate representative because it believes all proposed Class members have been similarly hurt by Defendant's discontinuance of SEP. But this does not take into account the fact that Class members who have signed a release will have to litigate the validity of their release before joining the Class. See, Melong, 643 F.2d at 15.

While the Court would hesitate to say Plaintiff's interests are antagonistic to the releasing Class members on this point, there is certainly an added complexity to having Plaintiff serve as Class representative. It is also well-established that class certification is inappropriate where members of the class have conflicting interests. See, Broussard v. Meineke Discount Mufflers Shops, Inc., 155 F.3d 331, 338-340 (4th Cir. 1998). Ms. Stewart's interests may significantly diverge from the other Class members if the settlements that Avon has previously entered with approximately 90% of the proposed Class are invalidated due to this litigation. The signing Class members received a lump sum payment in exchange for their release. If joined in Plaintiff's proposed Class, they may be forced to return the payment and be subject to counterclaim by Avon for

breach of the release agreement. See, Ciarlante, 1995 WL 764579 at *1. (court noted that defendants are likely to pursue counterclaims against the Releasee Class members for breach of contract). Second, the releasee Class members may end up with less money if the release is voided and the Class loses. Third, even if the Class wins, they may still receive less in damages than they did from the lump sum payment. All of these potential conflicts of interest could lead to a schism between Plaintiff and the various putative Class members regarding the appropriate strategy and remedy to pursue. It would be inappropriate to name as Class representative a plaintiff who, when faced with the same choice as her proposed Class members, chose a different course of action than 90% of them. Therefore, the Court finds that the Plaintiff would not be an adequate Class representative.

IV. CONCLUSION

Since the Court finds that the Plaintiff would not be an adequate Class representative, the proposed Class will not be certified. While it is, therefore, unnecessary to determine whether the class meets the requirements of Rule 23(b), the Plaintiff has also failed to establish the predominance of common questions or the superiority of the class action as a means of redressing grievance as required under Fed R. Civ. P. 23(b)(3). For example, given the fact that matters of individual reliance will likely be litigated, it is disputable whether common questions of law or fact predominate. There is also doubt over the superiority of the class action in this matter. This class action might prove unmanageable, as the law of as many as 50 states may have to be interpreted with regard to breach of contract and unjust enrichment claims. Other

civil actions have been filed against Avon regarding the termination of SEP¹. This filings suggests that parties who oppose Avon's policies have the resources to and may prefer to bring individual actions against the company.

The Class proposed by the Plaintiff, Ms. Stewart, will not be certified.

An appropriate order follows.

The three actions against Avon, two actions in New York State, and a suit by individual plaintiffs in a Virginia federal court, have been dismissed on the merits.

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Defendant.

ORDER

AND NOW this 15th day of November, 1999, upon consideration of the Plaintiff's Motion for Class Certification (Docket No. 16), the Defendant's response thereto (Docket No. 17), and the Plaintiff's Reply (Docket No. 20), it is hereby **ORDERED** that the Motion is **DENIED**.

BY	THE COU	JRT:	